Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STEPHEN M. LAFONTAINE, ***Petitioner***

v.

STATE OF GEORGIA, ***Respondent***

On Petition For Writ Of Certiorari
To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Whether, in accordance with the Fourth Amendment and the case law of this Court, a roadblock constituted an unreasonable seizure where the field troopers who established the roadblock retained complete discretion for the placement, time and duration of the roadblock, subject only to a standing order from superiors to implement such roadblocks "weather permitting," and, where the purpose for the roadblock was articulated by the field troopers as being to check for "all violations of Georgia state law as well as license and insurance."

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SUPREME COURT OF THE UNITED STATES

OCTOBER, 1997

STEPHEN M. LAFONTAINE, ***Petitioner***

v.

STATE OF GEORGIA, ***Respondent***

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App. A, *infra*, 2a-11a) is reported at 497 S.E.2d 367 (Ga. 1998). The order of the State Court of Forsyth County (App., *infra*, 12a-15a) is unreported.

JURISDICTION

The Supreme Court of Georgia entered its judgment on March 16, 1998, (App., *infra*, 2a-11a), and denied Petitioner's Motion For Reconsideration on April, 1, 1998,(App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

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STATEMENT OF THE CASE

On October 22, 1996, at 10:10 a.m. Petitioner was stopped at a roadblock operated by Georgia state troopers, and was subsequently arrested for DUI. According to the troopers who arrested Petitioner, the purpose of this "road check" was to check for *all* violations of Georgia law. The troopers utilized their own discretion in determining the time, duration, and place of the roadblock, subject only to a standing order from superiors to conduct such roadblocks each day, "weather permitting."

A. The "Road Check"

On October 22, 1996, at 10:10 a.m., Petitioner pulled into a "road check" on Old Atlanta Road, that had been set up by State Trooper Chad Barrow and two other troopers. This "road check" was, according to the troopers' testimony, designed to check for *all* violations of Georgia State law, as well as to check for licenses and insurance. The decision to place the "road check" on Old Atlanta Road was made entirely by the three non-supervisory level State Troopers. The Troopers had a standing directive from their supervisor to conduct a road block *someplace* every day, "weather permitting."

State Trooper Jackson asked Petitioner for his license and insurance card and noticed an odor of alcohol about Petitioner. Petitioner then consented to performing voluntary field evaluations. Following the evaluations, the troopers arrested Petitioner for DUI, and read the Implied Consent Notice to him, pursuant to O.C.G.A. § 40-5-67.1.

Petitioner was taken to the Baptist North Hospital for a blood test. Blood was drawn from Petitioner's arm at approximately 10:45 a.m. Petitioner's blood test yielded an alcohol content result of 0.11 grams %.

B. Proceedings Below

The arresting troopers charged the Petitioner with Driving Under the Influence in accordance with Title 40, Chapter VI, Section 391, of the Official Code of Georgia. At a bench trial in the State Court of Forsyth County, held on March 26, 1997, Petitioner was found NOT GUILTY of the "less safe" DUI charge pursued by the State [O.C.G.A. § 40-6-391 (a)(1)], and GUILTY of the "per se" DUI charge, or driving with an unlawful blood alcohol level [O.C.G.A. § 40-6-391 (a)(5)].

Petitioner's conviction on the "per se" DUI charge was based on the 0.11 grams alcohol concentration reading from the blood test that Petitioner was subjected to after his arrest at the roadblock.

Petitioner appealed his conviction to the Supreme Court of Georgia on the grounds that the roadblock, ***as conducted*** by the State Troopers, was in violation of the Fourth Amendment's protection against unreasonable seizure. Specifically, Petitioner contended that the road block ***in this case*** was arbitrarily and capriciously established, without sufficient guidelines and rules to assure non-arbitrary detention of citizens. Petitioner contended that the roadblock, when subjected to Fourth Amendment analysis, was legally deficient as a matter of law.

On March 16, 1998, the Supreme Court of Georgia, in a four-to-three decision, ruled that the roadblock was not conducted in such a manner as to violate the Fourth Amendment. The court held that the roadblock as conducted was not arbitrary, and was within "constitutional confines," despite the unfettered discretion that the field troopers were given to determine the time, place and duration of the roadblock.

The Supreme Court of Georgia, citing ***Michigan State Police v. Sitz***, 469 U.S. 444, 450 (1990), acknowledged that in examining the propriety of roadblock stops, the issue is not whether there was probable cause to stop the vehicle, but whether the roadblock was otherwise implemented and conducted in a manner as to demonstrate the stop of the vehicle was "reasonable" under the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

I. The decision of the Supreme Court of Georgia is erroneous and is in direct conflict with the clear weight of the case law of the courts of other states and the United

States Supreme Court, in holding that the discretion of field officers to determine the time, place and duration of roadblocks that check for "all violations of State law" does not violate the Fourth Amendment protection against unreasonable seizures.

The Supreme Court of Georgia's decision in the case at bar is erroneous and is in direct conflict with the clear weight of decisions from the courts of other states and the United States Supreme Court. The relevant case law on this question clearly indicates that roadblocks to detect "any violation of state law" where non-supervisory field officers have unfettered discretion as to the time, place and duration, are in violation of the Fourth Amendment.

The Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is made applicable to the states by the due process clause of the Fourteenth Amendment. ***Mapp v. Ohio***, 367 U.S. 643, 655, (1961). This Court has held that whenever a government official directs a vehicle to stop, however briefly, he has "seized" the occupant, and the Fourth Amendment is thereby implicated. ***United States v. Martinez-Fuerte***, 428 U.S. 543, 556 (1976).

In ***Martinez-Fuerte***, this Court upheld the use of permanent United States Border Patrol checkpoints established to briefly stop vehicles and check for illegal aliens. The Court noted that the locations for checkpoints were determined by supervisory personnel pursuant to Border Patrol standardized procedures, and that the effectiveness of the stops could be evaluated by empirical evidence. ***Martinez-Fuerte***, 428 U.S. at 554.

In ***Brown v. Texas,*** 443 U.S. 49 (1979), this Court held that the reasonableness of a roadblock seizure depends upon the balance between the public's interest and the individual's right to be free from arbitrary interference by

police. ***Brown*** requires balancing the public's interest against the individual's right to personal security in light of three factors:

(1) the state interest involved,

(2) the effectiveness of the procedure used in achieving its goal, and

(3) the level of intrusion on the individual's privacy. ***Brown***, 443 U.S. at 50-51.

The Court applied the three factors of the ***Brown*** balancing test in ***Michigan Department of State Police v. Sitz***, 496 U.S. 444 (1990). The Court noted that:

(1) a legitimate state interest was involved in that the roadblock was established as a sobriety checkpoint,

(2) the effectiveness of the roadblock involved could be established because the State Police collected empirical evidence, and

(3) the level of intrusion on individual privacy was minimized by guidelines promulgated by an advisory committee to the Director of the State Police that *limited the discretion* of the field officers. These guidelines governed roadblock operations, site selection and publicity. ***Sitz***, 496 U.S. 444, at 447, 454-455.

In contrast to ***Sitz***, in ***Deleware v. Prouse***, 440 U.S. 648 (1979), the Court held that a suspicionless stop is unconstitutional where there are no objective standards governing the officers' discretion, and no empirical evidence to establish the stop's effectiveness in promoting highway safety. This Court noted that "standardless and unconstrained discretion is the evil the court has discerned when...*it has insisted that the discretion of the official in the field be circumscribed.*" (emphasis added) ***Prouse***, 440 U.S. at 661.

In following the guidance of ***Sitz***, the Tennessee Court of Criminal Appeals held that a roadblock was conducted unconstitutionally where the field officers retained discretion for the placement and time of the roadblock, and there were no administrative guidelines. ***State v. Downey***, 1995 WL

594346 (Tenn. Crim. App.), *aff'd*, 945 S.W.2d 102 (Tenn. 1997). The court held that the case "exude[d] the stench of unfettered discretion in the field," ***Downey***, 1995 WL 594346 at 10, and, that "to allow unfettered discretion...to arbitrarily seize anyone traveling upon the public highways strikes at the very heart of the protection guaranteed...citizens by the Fourth Amendment." ***Downey***, 1995 WL 594346 at 10, quoting ***State v. Westbrooks***, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979).

Similarly, in ***State v. Sanchez***, 856 S.W.2d 166 (1993), the Texas Court of Appeals held that a roadblock was unconstitutional where it was established by field officers without specific guidance of superiors, standardized operating procedures, or empirical evidence to track the roadblock's effectiveness. ***Sanchez***, 856 S.W.2d at 169, 170.

In ***Commonwealth v. Donnelly***, 614 N.E.2d 1018 (1993), the Massachusetts Court of Appeals held that because the State failed to produce empirical evidence that the roadblock was set up in "problem area," and too much discretion was left to the police, the roadblock was unconstitutional under ***Sitz***.

In ***Martinez-Fuerte***, ***Brown***, and ***Sitz***, checkpoints and roadblocks were upheld where the field officers' discretion was limited by standardized guidelines and supervisory control, and empirical evidence was collected. But in the case at bar the field officers' discretion remained unfettered by such guidelines and supervisory control, and no empirical evidence was maintained. Nevertheless, the Georgia Supreme Court upheld the "constitutionality" of the roadblock.

Similarly to ***Prouse***, where this Court held a stop to be unconstitutional where there were no objective standards governing the officers' discretion, and no empirical evidence to establish the stop's effectiveness, Petitioner's vehicle was also stopped by officers who had virtually no limits on their discretion and who collected no empirical data to evaluate the

effectiveness of such stops. Despite these similarities the Supreme Court of Georgia chose not to follow this Court's guidance in ***Prouse***, and held that the unfettered discretion of the field officers as to time, place and duration, and the lack of keeping empirical data on effectiveness did not serve to make the stop unconstitutional.

The courts of other states, as evidenced in ***Downey, Sanchez,*** and ***Donnelly***, when confronted with facts that were virtually identical to the case at bar, have followed the Supreme Court's decisions in ***Martinez-Fuerte, Brown, Sitz,*** and ***Prouse***, by holding that where field officers have unfettered discretion in conducting roadblocks, and where no empirical evidence is gathered to evaluate their effectiveness, such roadblocks are operated unconstitutionally. The Supreme Court of Georgia's decision in the case at bar stands in direct conflict with these decisions.

Unlike ***Sitz***, the case at bar does *not* involve a sobriety checkpoint. The "road check" was designed to check for *all* violations of Georgia State law, as well as to check for licenses and insurance. The arresting officer testified that this roadblock was not specifically a sobriety checkpoint. Thus, the State's compelling interest in deterring drunk driving is not applicable as that was never stated as the objective.

The officer further testified that there was no guidance from any Georgia State Patrol supervisor as to *where* to set up the roadblock, just a standing directive to set one up, "weather permitting." He further testified that there were no calls about violations of the DUI law in the area in which the Troopers set up the roadblock.

A roadblock such as the one here violates the very delicate exception that the federal courts have "carved out" of the Fourth Amendment for establishing the proper use of sobriety checkpoints. Clearly, such unbridled and unsupervised use of the police power is not permissible.

Moreover, in ***Sitz***, the State of Michigan was able to produce information regarding the number of stops, length of

each stop, and number of arrests generated by the roadblock under review. The maintenance of such data is critical to assure (pursuant to subsequent court inquiry) that these roadblocks have not been used in a pretextual manner or used in an arbitrary and capricious fashion to deprive citizens of their legitimate right of privacy and freedom from unlawful searches and seizures.

Here, the Georgia State Patrol has not even bothered to keep records. Thus, it is impossible for the Court to assess the effectiveness of the roadblock since vital statistical information is lacking. Such failure to utilize statistical data was an abuse of discretion by the officers in this case, and violates the spirit of the ***Sitz*** decision. Combined with the allowance of unfettered discretion for roadblock site selection and purpose, roadblocks in Georgia provide no accountability to the motoring public.

Petitioner asserts that just as the case at bar, ***Sitz*** was a close case, 6-3. The ***Sitz*** decision hinged on the whether the seizure was reasonable. Id. at 444 U.S. 450. Petitioner respectfully asks this Court to look at the facts of the roadblock in ***Sitz*** and to compare those vastly different and more compelling facts to the roadblock here. If the United States Supreme Court in ***Sitz*** had been presented instead with the facts of the case at bar, (that two field officers had standing orders to set up a roadblock *anyplace* and *anytime* to check for *any violation* in Georgia law, and were not required to gather or record any statistics) would the ***Sitz*** roadblock still have been determined to have been constitutionally reasonable?

Based upon the foregoing, Petitioner's position is that the roadblock was established without sufficient guidelines and rules for assuring non-arbitrary implementation. This is **NOT** a facial attack upon the constitutionality of roadblocks, but only on the roadblock as conducted in this case. Petitioner therefore requests a ruling that the roadblock utilized in this case, as configured and lacking proper supervisory input and

statistical record-keeping, is legally deficient as a matter of law. Therefore, the roadblock was an unreasonable seizure, and the arrest of the Petitioner and all evidence gathered after the arrest should have been suppressed.

II. The question presented is of extreme importance because the unfettered discretion of field officers to conduct seizures of travelers on Georgia's road is directly in violation of the Fourth Amendment's protections from unreasonable seizures.

This case is of extreme importance because the Supreme Court of Georgia has failed to protect the travelers on Georgia's road from the unfettered discretion of field police officers to conduct unreasonable seizures.

In ***Prouse,*** this Court noted that "standardless and unconstrained discretion is the evil the court has discerned when...it has insisted that the discretion of the official in the field be circumscribed." In the decision below, Justice Sears of the Georgia Supreme Court wrote in her dissent, "If the Fourth Amendment...means anything at all it means that field officers have no business arbitrarily and indiscriminately stopping people from traversing our roads."

However, the courts of Georgia have not consistently acted to protect its citizens from such arbitrary seizures. A review of Georgia's prior cases will illustrate this point.

The case that was formerly cited as the leading case in Georgia was ***State v. Golden,*** 318 S.E.2d 693 (Ga. Ct. App. 1984). ***Golden***, which was decided before ***Sitz***, seemingly established the following criteria for the proper implementation of roadblocks in Georgia:

(1) the decision to implement the roadblock must be made by supervisory personnel rather than the officers in the field;

(2) the officers must have no discretion in stopping vehicles;

(3) motorists must experience only minimal delay;

(4) the roadblock must be well identified as a police checkpoint; and

(5) the screening officers must be specifically trained to make an initial determination of intoxication.

However, in ***Mims v. State,*** the Georgia Court of Appeals apparently rejected its own ***Golden*** test. In ***Mims*** the officer manning the roadblock admitted that the roadblock did not, in fact, comply with the standards set forth in ***Golden***. The officer admitted that "he had the prerogative of authorizing and setting locations of roadblocks, [and] he authorized the roadblock." Further, at the time he stopped Mims, the officer was waiting for another officer to provide additional personnel at the roadblock, and the roadblock was set up and identified by only *one* car. The roadblock consisted of *one* officer standing in the middle of the road. After apprehending Mims, the officer called the other trooper and *canceled the roadblock* in order to take Mims to jail. ***Mims v. State***, 410 S.E.2d 824 (Ga. Ct. App. 1991).

The intermediate appellate court upheld the roadblock test even though it failed the ***Golden*** criteria:

(1) the decision to implement the roadblock was not made by supervisory personnel, but by officers in the field;

(2) the roadblock was not well-identified as a police checkpoint (reflecting signs and orange cones were used in ***Golden***);

(3) there were no separate screening officers and no allegations as to training; and

(4) Mims may well have been the *only* motorist stopped by the "roadblock" as it was closed after he was arrested.

After the decision in ***Mims***, an even more constitutionally questionable use of roadblocks was also upheld by the Georgia Court of Appeals in ***Christopher v.***

State, 413 S.E.2d 236 (Ga. Ct. App. 1991). In this case, the police responded to neighbors' reports of a loud party by setting up a roadblock at all access points leading from the party. The court upheld the roadblock saying that as long as *all* vehicles were stopped, the roadblock would not be considered a mere pretext to stop the driver. This case blatantly violates the principles of both ***Golden*** and ***Sitz*** as the roadblock was not set according to neutral guidelines, but was specifically designed to trap motorists exiting this particular social gathering.

On facts similar to ***Christopher***, the Texas Court of Appeals ruled exactly the opposite of our Court of Appeals. ***Higbie v. State***, 723 S.W.2d 802 (Tex. Ct. App. 1987). A roadblock set up to check the validity of driver's licenses at closing time for a nearby bar was held unconstitutional. Likewise, the Idaho Supreme Court held that a roadblock established on Memorial Day weekend wherein all motorists were stopped was held unconstitutional in ***State v. Henderson***, 756 P.2d 1057 (Idaho 1988).

After ***Mims*** and ***Christopher***, it would appear that the only procedural challenge to roadblocks recognized by the Georgia Court of Appeals is whether all vehicles passing through the roadblock are stopped. Since the court in ***Mims*** upheld a one car, self-authorized roadblock, this suggests that as long as the officers do not *walk* to the site of the roadblock (i.e., have *no* patrol car on the scene), there are no procedural requirements beyond stopping every vehicle.

The meaningless standards established by these Georgia appellate cases are in stark contrast to the Fourth Amendment requirements announced in ***Sitz*** which emphasized the importance of visibility and the non-random nature of the roadblocks. Furthermore, Georgia's appellate courts have glossed over the "sobriety checkpoint" justification for use of random roadblocks, as well as the necessity to keep statistical data to verify the checkpoint's effectiveness.

It is clear from the holding in the case at bar, and in cases such as ***Mims*** and ***Christopher***, that travelers on the roads of Georgia can not expect the courts of Georgia to protect them from the unfettered discretion of field officers to conduct unreasonable and unconstitutional seizures. And, since Georgia's courts have further excused its officers from maintaining any statistical data on the effectiveness of roadblocks, citizens have no meaningful opportunity to challenge these illegal stops, regardless of abusive practices that may occur.

Accordingly, it is imperative that the Supreme Court of the United States act to insure that the basic "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is made applicable to the state of Georgia.

CONCLUSION

The petition for a writ of certiorari should be granted.

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SUPREME COURT OF GEORGIA
Case No. S97A1814 Atlanta, April 01, 1998

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

STEPHEN M. LAFONTAINE v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur except Benham, C.J., Fletcher, P.J., and Sears, J., dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Sherie M. Welch, Clerk.

In the Supreme Court
of Georgia

LAFONTAINE
v.
STATE OF GEORGIA

497 S.E.2d 367 (1998).

March 16, 1998

HUNSTEIN, Justice.

Stephen LaFontaine was convicted of violating OCGA § 40-6-391(a)(5), the per se offense of operating a moving vehicle while having an unlawful blood alcohol level. On appeal, LaFontaine claims the roadblock which led to his arrest violated the Fourth Amendment to the United States Constitution, that OCGA § 40-6-391(a)(5) is unconstitutional, and that his challenge to the traffic citation should have been sustained. We conclude that no error occurred and affirm.

1. LaFontaine's challenge to the constitutionality of OCGA § 40-6-391(a)(5) is of no avail as this court has recently upheld the constitutionality of that statute against the challenges raised in his appeal. See ***Bohannon v. State***, 497 S.E.2d 552 (1998).

2. LaFontaine's challenge to the admissibility of the blood test results on the ground that the testing procedures have not been properly approved under the Administrative Procedures Act is without merit as that issue was decided adversely to him in ***Price v. State***, 498 S.E.2d 262 (1998).

3. T.J. Jackson, a Georgia State Patrol trooper, testified that on the morning of October 22, 1996, he and a fellow officer conducted a roadblock on Old Atlanta Road in

Forsyth County for the purpose of examining the driver's licenses and proof of insurance of all vehicles traveling on that roadway as well as to check for other violations of Georgia law. The decision to implement the roadblock was made by a State Patrol supervisor, although the determination as to the location of the roadblock was made by the field officers. Trooper Jackson testified that the determination as to the location of a roadblock is often based on factors such as a high number of complaints about traffic violations on a particular road. Without exception and pursuant to standard operating procedure, on the day in question the troopers checked the insurance and licenses of every driver that approached the roadblock. When LaFontaine arrived at the roadblock, Trooper Jackson detected a strong odor of alcohol and observed that LaFontaine's face was flushed and his eyes bloodshot. When questioned about his use of alcohol, LaFontaine informed the trooper that he had been drinking until about 4:00 a.m., but had not had anything to drink since that time. After failing field sobriety tests, LaFontaine was taken to a hospital for a blood test; the test yielded a blood-alcohol content of 0.11 grams and LaFontaine was issued a Uniform Traffic Citation.

In examining the propriety of roadblock stops, the issue for resolution is not whether there was probable cause to stop the vehicle, but whether the roadblock stop was otherwise implemented and conducted in a manner as to demonstrate that the stop of the vehicle was "reasonable" under the Fourth Amendment. ***Michigan Dept. of State Police v. Sitz***, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990). *See* ***Christopher v. State***, 413 S.E.2d 236 (1991).

> "It has been held that police officials may set up highway roadblocks for the purpose of requiring motorists to display their driver's license, and that such a practice does not invade their right to use the public ways free from unreasonable and unwarranted

> interception. Nor does such a practice constitute an unlawful arrest or restraint or an illegal search contrary to the United States Constitution." [Cit.] "The [S]tate can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness...." [Cits.]

State v. Swift, 232 Ga. 535(1), 207 S.E.2d 459 (1974). Although a roadblock cannot be used as a subterfuge to detain citizens for the purpose of searching their automobiles, a momentary stop of a traveling citizen to perform the license checks or to check the present fitness of a car or driver for further driving is permissible. Id.; ***Brisbane v. State***, 233 Ga. 339, 343-344, 211 S.E.2d 294 (1974). Roadblock stops have appreciably less intrusion on the part of travelers and do not create the fear and surprise engendered in motorists by roving patrol stops because the motorist is not singled out; the traveler is reassured when all vehicles are stopped. ***Sitz***, supra at 452-453, 110 S.Ct. at 2486-2487.

We conclude under the circumstances of this case that the roadblock set up primarily as a means to perform routine traffic checks was valid. ***State v. Golden***, 171 Ga.App. 27, 318 S.E.2d 693 (1984), articulates specific factors to determine when a roadblock is satisfactory. A roadblock is satisfactory where the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; all vehicles are stopped as opposed to random vehicle stops; the delay to motorists is minimal; the roadblock operation is well identified as a police checkpoint; and the "screening" officer's training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication. Id. at 29-30, 318 S.E.2d 693. Applying ***Golden*** to the facts of this case it is clear that the roadblock was satisfactory. The roadblock was established and implemented

by supervisory personnel and although field troopers were given limited decision making authority where to place the roadblock, their discretion was clearly minimal.

We therefore conclude that the trial court properly denied LaFontaine's motion to suppress because there is no evidence of unfettered discretion by the field troopers and LaFontaine made no showing that the roadblock was arbitrary or oppressive to motorists. LaFontaine's arrest was not the result of a State trooper's whimsical decision to stop only his vehicle or an arbitrary scheme to single him out. See ***Christopher***, supra at (1), 413 S.E.2d 236; ***Mims v. State***, 201 Ga.App. 227, 410 S.E.2d 824 (1991). The stop was made within the constitutional confines of a routine motorist roadblock on Old Atlanta Road and LaFontaine's ensuing arrest was the result of his personal decision to operate a motor vehicle while in an intoxicated state.

4. Prior to his nonjury trial, LaFontaine filed a general demurrer to the sufficiency of the traffic citation on the ground that it failed to inform him of the specific conduct and statutory provisions allegedly violated by him. The citation alleged the crime committed was a violation of OCGA § 40-6-391. LaFontaine was found guilty by the trial judge of a violation of OCGA § 40-6-391(a)(5) (existence of alcohol concentration per se violation) and not guilty of any violation of OCGA § 40-6-391(a)(1) (under the influence to the extent it is less safe to drive). The trial transcript shows that although LaFontaine filed his demurrer prior to trial, he failed to obtain a ruling on it until after the trial had commenced. As a result, the trial court correctly held that LaFontaine had waived his right to challenge the citation. ***Andrew v. State***, 216 Ga.App. 819, 820, 456 S.E.2d 227 (1995); ***Dean v. State***, 214 Ga.App. 768, 770, 449 S.E.2d 158 (1994). See generally OCGA § 17-7-111.

Judgment affirmed. All the Justices concur, except Benham, C.J., Fletcher, P.J., and Sears, J., who dissent.

SEARS, Justice, concurring in part, and dissenting in part.

If the Fourth Amendment to the United States Constitution means anything at all it means that field officers have no business arbitrarily and indiscriminately stopping people from traversing our public roads. The Fourth Amendment's concerns -- to protect citizens from arbitrary and unreasonable intrusions by the State--can easily be satisfied by requiring that roadblocks be established only with systematic supervisory control. Without such extensive control, people will not be free to travel public roads without the fear and nuisance of encountering arbitrary and indiscriminate roadblocks. It is for this reason that I concur in Divisions 1, 2, and 4 of the majority opinion, but dissent to Division 3 and to the judgment.

1. LaFontaine's first enumeration raises the issue of the constitutionality of roadblocks established for the purpose of checking driver's licenses, vehicle registrations, and other motor vehicle violations.

Trooper Jackson of the Georgia State Patrol testified that at 10:00 a.m. on the morning of October 22, 1996, he was conducting a roadblock on Old Atlanta Road in order to detect "any violation of Georgia law, whatsoever," including violations of laws governing driver's licenses and mandatory insurance requirements. He added that he and his fellow officer stopped every car that approached the roadblock, and that that procedure was standard policy. The only evidence that supervisory personnel had any role in the roadblock in question was Trooper Jackson's testimony that a supervising officer had issued standing orders for field officers to conduct roadblocks, weather permitting. Trooper Jackson, however, testified that the field officers had complete discretion concerning where to locate the roadblock. The record thus demonstrates that the field officers had the discretion to control the time, the place, and the duration of the roadblock,

and that the only limitation on their discretion was that they had to stop each vehicle.

In determining whether a roadblock violates the Fourth Amendment to the United States Constitution, it is beyond dispute that a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint[1]. The question then becomes whether the seizure was reasonable under the Fourth Amendment. This question is answered by balancing the State's interest, the effectiveness of the roadblock in advancing that interest, and the level of intrusion upon the individual driver's privacy.[2]

As for the first factor, I conclude that it is clearly satisfied in this case, as courts have uniformly and properly recognized that states have a significant interest in enforcing their motor vehicle laws regarding licensing, insurance, and registration.[3]

Further, as for the second factor of whether the roadblock advanced the public interest, the record is silent about the number of violations discovered during the roadblock in question. In ***Sitz***, the Supreme Court concluded that the effectiveness prong of the balancing test was satisfied by empirical evidence that about 1.6% of drivers stopped were arrested for alcohol Impairment.[4] The Court, however,

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[1] ***Michigan Dept. of State Police v. Sitz***, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990).

[2] ***Sitz***, 496 U.S. at 450, 110 S.Ct. at 2485 (stating that the balancing analysis set forth in ***Brown v. Texas***, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979), was the relevant test for determining the constitutionality of roadblocks).

[3] See ***Simmons v. Commonwealth of Virginia***, 238 Va. 200, 380 S.E.2d 656, 658 (1989); ***Delaware v. Prouse***, 440 U.S. 648, 658, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979); ***State v. Larson***, 485 N.W.2d 571, 572 (Minn.App.1993).

[4] ***Sitz***, 496 U.S. at 454-55.

did not hold that empirical evidence is required to demonstrate that roadblocks reasonably advance the state's interests, and other courts have refused to require such empirical evidence.[5] It is unnecessary in this appeal to resolve whether empirical evidence is required because I conclude that the third factor--the intrusion on individual liberty-- tips the balancing test against the State.

Under the third prong of the balancing test, courts consider such factors as the duration of the stop, the intensity of the investigation, the fear and surprise in law-abiding motorists that may be raised by the stop, and the extent to which the roadblock is left to the discretion of field officers.[6] The latter factor is determinative in the present case. As for that factor, many courts have agreed that for roadblocks to be constitutionally reasonable, it is imperative that they be established by supervisory personnel in order to avoid the arbitrariness that is possible if the time, location, manner, and duration of the stops are left to the discretion of officers in the field.[7] As the Supreme Court of Virginia stated in ***Simmons***:

> To avoid constitutionally impermissible infringements on privacy, the roadblock must be carried out pursuant to a plan or practice which is

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[5] ***State v. Loyd***, 530 N.W.2d 708 (Iowa 1995).

[6] ***Sitz***, 496 U.S. at 451-453, 110 S.Ct. at 2485-2487; ***United States v. McFayden***, 865 F.2d 1306, 1312-1313 (D.C.Cir.1989); ***Simmons v. Commonwealth***, 238 Va. 200, 380 S.E.2d 656, 658-659 (1989).

[7] See ***State v. Sanchez***, 856 S.W.2d 166, 169-170 (Tex.Crim.App.1993); ***Simmons***, 380 S.E.2d at 658-59; ***State v. One 1987 Toyota Pickup***, 233 Neb. 670, 447 N.W.2d 243, 246-48 (1989); ***State v. Loyd***, 530 N.W.2d 708, 712 (Iowa 1995); ***State v. Downey***, 945 S.W.2d 102, 109-111 (Tenn.1997); ***Campbell v. State***, 679 So.2d 1168, 1170-72 (Fla.1996); ***People v. Wells***, 241 Ill.App.3d 141, 181 Ill.Dec. 505, 508-09, 608 N.E.2d 578, 581-82 (3 Dist.1993); ***United States v. McFayden***, 865 F.2d 1306, 1312, 1313 (D.C.Cir.1989); ***Larson***, 485 N.W.2d at 572-573.

> explicit, contains neutral criteria, and limits the conduct of the officers undertaking the roadblock. Such a plan serves to insure that one's "reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."[8]

The Court in ***Simmons*** rejected the contention that all that was necessary to make a roadblock constitutionally reasonable was for the police officers conducting the stop to stop every vehicle subject to the roadblock. The Court held, instead, that the roadblock had to be "undertaken pursuant to a specific plan or practice" that controlled the discretion of the officers in the field.[9] The Court found it fatal to the constitutionality of the roadblock that "the decision to establish the roadblock, as well as its location and duration was solely within the discretion of the troopers, and that "[n]o advance approval or authorization from any supervisor or superior officer was required to set up the roadblock."[10]

This position is consistent with one of the core concerns of the Fourth Amendment -- "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure ... must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[11] The same concern is echoed in the Court's opinion in ***United States v. Martinez-Fuerte***,[12] in

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[8] ***Simmons***, 380 S.E.2d at 658 (quoting ***Brown v. Texas***, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979)).

[9] Id. at 658-659.

[10] Id. at 659.

[11] ***Brown v. Texas***, 443 U.S. at 51, 99 S.Ct. at 2640 (citations omitted).

[12] ***United States v. Martinez-Fuerte***, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

which the Court analyzed the constitutionality of permanent immigration checkpoints operated by the Border Patrol. The Court stated that

> [t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.

In this same vein, a noted commentator has stated that

> [q]uite clearly, the question of where and when a ... roadblock is to be conducted should not be left to officers in the field. Rather, what is needed is that these roadblocks be "established by a plan formulated or approved by executive-level officers of the law enforcement agencies involved" which contains "standards ... with regard to time, place" and similar matters. This is because "in the absence of record evidence that the decision to establish the roadblock was made by anyone other than the officers in the field, the roadblock in question has certain characteristics of a roving patrol," namely, an appreciable risk of arbitrary basis for the site and time decision.[13]

The foregoing discussions reflect the concern that few experiences are as fundamental to liberty and freedom as maintaining control over when, how, where and by whom we will be stopped and questioned. It is not reasonable to grant broad powers regarding matters of such critical importance to

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[13] 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), at 697 (3d ed.1996) (footnotes omitted).

any and every law enforcement field officer. I conclude, therefore, that roadblocks must be conducted pursuant to a plan developed by supervisory personnel that establishes explicit, neutral criteria for all aspects of the roadblock, thus appropriately limiting the discretion of individual field officers, and protecting each person's fundamental right to be free from unreasonable invasions of privacy.[14]

Accordingly, in the present case, because the field officers had the discretion to control the time, the place, and the duration of the roadblock, and because the only limitation on the officer's discretion that is demonstrated by the record is that the officers had to stop each vehicle, I conclude that the roadblock violated the Fourth Amendment standard of reasonableness, and I thus would reverse the trial court's denial of LaFontaine's motion to suppress.[15]

I am authorized to state that Chief Justice Benham and Presiding Justice Fletcher join in this concurrence in part and dissent in part.

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[14] To the extent that the Georgia Court of Appeals has rejected the notion that control of a roadblock by supervisory personnel is a prerequisite to the constitutionality of the stop, see, e.g., ***Mims v. State***, 201 Ga.App. 277, 279-280, 410 S.E.2d 824 (1991), I would overrule those cases.

[15] Compare ***State v. Swift***, 232 Ga. 535(1), 207 S.E.2d 459 (1974), in which this Court approved a roadblock as constitutionally reasonable, but did not discuss the factors that led to that conclusion.

IN THE STATE COURT OF
FORSYTH COUNTY, GEORGIA
FINAL DISPOSITION

STATE OF GEORGIA CRIMINAL ACTION NO. 96-101,900
VS.
STEPHEN M. LAFONTAINE

Count	Offense	Months of Sentence
1	Driving Under the Influence	12

MISDEMEANOR SENTENCE

WHEREAS, the above named Defendant has been found guilty/plead guilty of the above-stated offense, whereupon, it is ordered and adjudged by the Court that the said Defendant is hereby sentenced to confinement for a period of 12 months in the State Penal System or other institution as the Commissioner of the Georgia Department of Corrections may direct, to be computed as provided by law.

HOWEVER, it is further ordered by the Court that the above sentence may be served on probation, provided that said Defendant complies with the following conditions, including special conditions, herein imposed by the Court as part of this sentence.

CONDITIONS OF PROBATION

The Defendant, having been granted the privilege of serving all or part of the above stated sentence on probation, is hereby ORDERED TO COMPLY with the following conditions of probation listed below and on the reverse side of this sentence which conditions by reference are made a part of this sentence:

(1) IT IS FURTHER ORDERED that the Defendant shall pay:

COUNT 1

(a) fine $1000.00
(b) POST fee $50.00
(c) jail fee $100.00
(e) DUI fee $25.00
(f) LVAP fee $50.00
(h) probation supervision fee of $30.00 per month while on probation.
(i) All Court ordered payments are to be made to GPM at the rate as set by the Probation Officer, beginning 3-26-97.
(2) Do not violate the criminal laws of any government unit.
(3) Avoid injurious and vicious habits, especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed by law.
(4) Avoid persons and places of disreputable or harmful character.
(5) Report to the probation Officer as directed and permit such Supervisor to visit him/her wherever he/she may be located.
(6) Work faithfully at suitable employment so far as may be possible.
(7) Do not change his/her present place of abode or leave the State for any period of time without prior permission of the Probation Officer.
(8) Support his/her legal dependents to the best of his/her ability.
(9) Follow and abide by all the legal instructions and directions of the Probation Officer and truthfully answer all questions of the Probation Officer.
(10) Probationer shall not take into his/her body any substance prohibited and/or controlled by any law of the State of Georgia or the United States except pursuant to a physician's prescription which shall be submitted to the Probation Officer for inspection and copy prior to ingesting any of the prescribed substances.
(11) Probationer shall from time to time, upon oral or written request by the Probation Officer or any law enforcement

officer, produce specimen of any bodily substance for analysis for the presence of a substance prohibited by any law of the State of Georgia or the United States, the cost of such drug testing shall be borne in full by Probationer and due in full at the time of said test.
(12) Probationer shall submit to a search of his/her person, houses, papers, and/or effects as these terms of the Fourth Amendment to the United States Constitution and the Constitution of the State of Georgia are defined by the Courts, any time of the day or night, with or without a search warrant, whenever requested to do so by a Probation Officer or any law enforcement officer and probationer specifically consents to the use of anything seized as evidence in any Judicial proceedings or trial.
(13) An arrest, for any reason, shall be reported within forty-eight (48) hours to the Probation Officer.
(14) Probationer shall execute a "Release and Consent Form" allowing GPM to review Probationer's criminal history record and further, Probationer shall pay, within thirty(30) days from demand , the reasonable and actual costs of GPM's procurement of said criminal history record and all attendant documents.

THE FOLLOWING SPECIAL CONDITIONS
(1) Probationer shall not possess any alcohol nor occupy any residence or vehicle where such is present and shall be subject to random testing at his/her own expense.
(2) Probationer shall at his/her own expense submit to an evaluation by the Probation Officer for substance abuse. If the evaluation indicates a treatment need, Probationer shall, at his/her own expense, actively participate in and complete a treatment program approved by his Probation Officer.
(4) Probationer will complete 80 hours of Community Service Work, at a rate of not less than eight (8) hours per week until completed, and shall execute a "Community Service Agreement."

(5) Probationer shall serve 2 days in the County Jail at the direction of the Probation Officer at his/her own expense. Probationer shall report to the County Jail on 3/28/97 at 8 p.m., pay jail board fee, and comply with all jail rules and regulations. Credit for time served for up to 6 hours or the exact amount as determined from jail log. s/ Jb.

The Defendant was represented by William Head, Attorney at Law, by Employment/Appointment.

SO ORDERED this 26 day of March, 1997.

s/ Jeffrey Bagley
Judge, State Court of Forsyth County

This is to certify that the Defendant has been duly instructed regarding the Conditions set forth in this Sentence. Instructions acknowledged by Defendant.

This 26 day of March, 1997.

s/ Teresa Page
Court Services Worker

s/ Stephen LaFontaine
Probationer

Fourth Amendment to the Constitution of The United States (in relevant part): "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

28 U.S.C. § 1257(a): Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Code of Georgia, Title 40, Chapter 5, Article 3:
40-5-67.1(b)(2) Implied consent notice for suspects age 21 or over:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.10 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to

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the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Code of Georgia, Title 40, Chapter 6, Article 15:
40-6-391(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

...

(5) The person's alcohol concentration is 0.10 grams or more at any time within three hours after such driving or being in actual control from alcohol consumed before such driving or being in actual physical control ended;

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